# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 24

QUALITY HEALTH SERVICES OF P.R., INC.

Respondent

And

UNIDAD LABORAL DE ENFERMERAS Y EMPLEADOS DE LA SALUD (ULEES)

**Charging Party** 

CASE NUM: 24-CA-11782

A.L.J. Geoffrey Carter, Esq.

# EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE DECISION

COMES NOW, the Hospital San Cristobal de Ponce (hereafter to be referred as "Respondent", "the charged party", "the Hospital", or "the employer") through the undersigned attorney and before this Board avers and attest:

#### **FIRST EXCEPTION**

The Administrative Law Judge (ALJ) determined that Respondent terminated the employees of the Dept. of Respiratory Care when there was no good faith impasse between the parties. See: Decision & Order at page 20, second paragraph.

Respondent's Base for the Exception

There was an impasse when Respondent decided to terminate the employment of the employees of the Respiratory Care Dept. in the afternoon of June 8<sup>th</sup>, 2011. In the case at bar the ALJ omitted to consider that the Human Resources Director (Candie Rodríguez) clearly and unequivocally had informed the Union in her July 6<sup>th</sup>, 2011 letter that the **final deadline** to reach an agreement for concessions from the Union or to proceed with the subcontracting was <u>July 8<sup>th</sup>, 2011</u>. In addition, the ALJ also failed to consider documentation admitted in evidence that proved that the principal top union officers directly and unequivocally stated during the subcontracting negotiations they were not going to accept or compromise to allow a subcontracting.

#### SECOND EXCEPTION

The Administrative Law Judge (ALJ) decision states that meaningful negotiations over the subcontracting did not end on July 8<sup>th</sup>, 2011 when the "meeting ended". Se: Decision and Order at page 19.

#### Respondent Base for the Exception

There were meaningful negotiations over the subcontracting and these negotiations ended when Respondent refused to accept a "poison pill" condition by the Union. In addition, the meeting did not "ended" as such as the ALJ states in his D & O. The ALJ erred in his statement about how the negotiation "ended" because the evidence shows

that the Union abandoned the negotiations after restating that there was not going to be an agreement.

#### THIRD EXCEPTION

The ALJ determined that a general memorandum issued by the Human Resources Director had the impact to construe an improper work rule and thus violated Section (a) (1) of the Act. See: Decision and Order, page 15, third paragraph.

#### Respondent Base for the Exception

In the case at bar the ALJ based his ruling without the G.C. having presented testimonial evidence to support the Complaint allegations. Respondent was proceeding to avoid a conduct of unrest among the Hospital employees by instigating fear that employment would be lost if the Hospital prevailed in the subcontracting.

#### FOUR EXCEPTION

The ALJ generally discarded respondent's Human Resources Director (H.R.D.) expressions as spoke-person during at the bargaining process.

The ALJ supports his credibility findings in four NLRB cases related to credibility determination. See: Decision and Order at page 8 (footnote)

12), page 11 (footnote 19), page 13, second paragraph (Discussion and Analysis Part A, <u>Credibility Findings</u>.

#### Respondent Base for the Exception

The ALJ did not credited Respondent's Human Resources (H.R.) Director testimony specially in major issues of the case at bar since this witness was not impeached by the General Counsel in those major issues. The ALJ did not consider corroboration evidence over the testimony of the H.R. Director either in a series of documents accepted in evidence and the testimony of certain witnesses.

# Specific Exception

The ALJ credited the Union's version of the minute of July 18<sup>th</sup> while rejecting Respondent's version because purportedly the Union's minute was fully consistent with facts, although there are differences between the two versions. **D & O at page 12, footnote 23**.

#### Respondent base for the Specific Exception

Respondent presented as witness at the hearing the person that registered the notes that were eventually were used to draft the Hospital's version of the minute of July 8<sup>th</sup>. This witness (Mrs. Marisel Padilla) testified facts that supported the contents of the

minute of the Hospital version. This witness was not cross-examined by the General Counsel nor questioned by the ALKJ. Although the ALJ accepts that there were discrepancies between the two minutes, the ALJ overlooked the testimony of this witness and opted to rely in the Union's version to base part of his findings and decision.

#### FIFTH EXCEPTION

The ALJ determined that "the Hospital did not present any credible evidence that its decision to subcontract with RTM to provide *per diem* employees was supported by an established past practice", therefore, respondent's reliance in *Westinghouse Electric Corp.* 150 NLRB 1574 was inappropriate. See: Decision & Order at page 17, last paragraph and page 17, footnote 27, second paragraph.

#### Respondent's Position

Respondent clearly and unequivocally presented documentary evidence that the Hospital had an on-going practice to hire *per diem* employees for its Respiratory Care Dept. since 2006. The ALJ failed to consider and weight said evidence.

#### SIXTH EXCEPTION

The ALJ did not made specific determinations as to the testimonies of Mrs. Marisel Padilla and Mrs. Ivette Ramos as the probative value of these witnesses was important to show credibility of the Hospital's main witness (Miss Candie Rodríguez) as well as respondent's financial problems to consider subcontracting to help to reduce its operational costs. (No identification of a given part of the decision can be offered since there were no determinations performed by the ALJ).

# Respondent's Base for the Exception

Respondent presented two (2) witnesses to support its position. One witness was Mrs. Marisel Padilla a management secretary that fully participated in the 5:00 p.m. negotiation meeting for the subcontracting. This witness duty was to take notes during the process. This witness was presented by Respondent to provided facts at the hearing as what happened during the negotiations, to corroborate the Human Resources Director credibility about the confirmation of the impasse, (b) the expressions of the union representatives during the negotiations and how that meeting ended. The ALJ neglected to take into consideration the testimony of this witness. Nor the ALJ evaluated the testimony of Mrs. Ivette Ramos, C.P.A. and the Hospital Finance Director who testified about Respondent's financial condition.

#### SEVENTH EXCEPTION

The ALJ recommends the issuance of a broad order arguably because allegedly Respondent has engaged in a repetitive activity to violate the Act. See: Decision and Order at page 22.

#### Respondent's Base for the Exception

1- The ALJ recommendation for a broad order is unsustainable in fact. The base for the ALJ's decision relies in two (2) cases (24-CA-11438 and 24-CA-11630), one which was been complied with partially and other which still is under the Board consideration. This decision conflicts with Respondent's right of a due process and review.

# **EIGHT EXCEPTION**

Adverse Inference: Request for an Specific Exception. The ALJ refused to find an adverse inference over the non appearance of the Union's President and the Executive Director. See: Decision and Order, page 12.

#### Respondent's Base for the Exception

The General Counsel failed to produce as witnesses the Union's President and its Executive Director when though these two top witnesses, as evidence showed, had proffered direct statements that they were not going to accept the subcontracting and/or that said subcontracting should had been set aside.

#### NINTH EXCEPTION

The ALJ determined that after the July 8<sup>th</sup> meeting the Union sent to Respondent on July 18<sup>th</sup> a communication in response to an H.R. Director letter and providing a model work schedule for the Respiratory Care Dept. and requesting further dialogue about these issues. See: **D & O at page** 12, Point 11, second paragraph.

# Respondent's base for this Exception

The ALJ failed to consider and analyze that Respondent offered the testimony of Mr. Carlos Diaz to provide his analysis over the Union's proposed work schedule model and this witness testified at the hearing that the work schedule was faulty. Mr. Díaz testimony was not rebutted, nor did General Counsel produced the person (the Union President) tht prepared this document. By accepting and/or considering this evidence the ALJ made determinations of a controverted fact.

Respectfully submitted this 27<sup>th</sup> of February, 2012, in San Juan, P.R.

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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has been filed at NLRB Region 24 offices at La Torre de Plaza Building, Suite 1002, Tenth Floor, 525 F.D. Roosevelt Ave., San Juan, P.R. 00918. I also certify that a copy has been sent via regular mail to the union's attorney, Mr. Harold Hopkins at P.O. Box 362905, San Juan, P.R. 00936-2904.

Respectfully submitted by certified mail number 7010-2780-0000-5630-5066 to the Office of the Executive Secretary of the N.L.R.B., at 1099 14<sup>th</sup> Street, N.W. Washington, D.C. 20570. This document has also been electronically filed at the N.L.R.B.

Respectfully submitted this 27<sup>th</sup> of February, 2012 in San Juan, P.R.

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